In the Supreme Court
OF THE
United States
IN ADMIRALTY

OCTOBER TERM, 1922

No. [redacted] 128

SVEN HAAVIK,
Appellant,
vs.
ALASKA PACKERS ASSOCIATION,
Appellee.

BRIEF FOR APPELLANT.

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Subject Index

	Page
Argument	1
Assignments of Error	7
Brief of the argument	9
Can an integral part of the United States impose a special burden on a citizen and resident of another part, not imposed on its own people	21
Review of the decision of the court in the case of Alaska Packers Association v. John Hedenskoy, 267 Fed. 154	31
No part of the United States can levy a tax on interstate and foreign commerce	17
Statement of facts	1
The deduction of this tax from appellant's wages in San Francisco, was unlawful	25
The school or poll-tax in this instance operated in the case of libelant as a tax for the privilege of entering Alaska	26
The law taxing non-resident fishermen was in violation of a part of Section 9 of the Organic Act of Alaska	30

Table of Cases Cited

	Pages
Board of Assessors of New Orleans, etc. 216 U. S. 517..	17
Brown v. Houston, etc. 114 U. S. 622.....	34
Brown v. Maryland, etc. 12 Wheat. 419.....	17
Brown v. Maryland, etc. 12 Wheat. 419-447.....	21
Caldwell v. North Carolina, 187 U. S. 622.....	20
City of Oakland v. Whipple, 30 Cal. 112.....	14
Crandall v. State of Nevada, 73 U. S. 35.....	27
Crenshaw v. Arkansas, 227 U. S. 390.....	20
Dewey v. Des Moines, 173 U. S. 194.....	12
Dozier v. Alabama, 218 U. S. 124.....	20
Eoff v. Kennefickers, Tax Collector, 96 S. W. 986.....	33
Ex parte White, 228 Fed. 88.....	15
Fennell v. Pauly, 83 N. W. 799.....	32
Geer v. Connecticut, 161 U. S. 519.....	24
Grigsby Coast Co. v. Freeman, 32 So. 399.....	32
Hays v. Pacific Mail S. S. Co., 17 How. 596.....	12
Kehrer v. Stewart, 197 U. S. 60-65.....	20
Kelley v. Rhodes, 188 U. S. 1.....	18
La. R. R. Com. v. Tex. P. R. R. Co., 229 U. S. 330-341...	18
Leloup v. Port of Mobile, 127 U. S. 640-5.....	20-21
Merriman v. Stower, 43 Maine 497.....	17
Metropolitan Life Ins. Co. v. Newark, 62 N. J. Law 74....	17
Morgan v. Packham, 16 Wall. 471-8-9.....	17
On Yuen Hai Co. v. Ross, 8 Sawyer 394.....	14
Opinions of the Judges, 1 Metcalfe 580.....	17
Passenger Cases, 7 How. 48 U. S. 282, 407.....	13
People v. Niles, 35 Cal. 282.....	15
People v. Townsend, 56 Id. 633.....	15
Preston v. City of Boston, 12 Pick. 7.....	17
Pullmans' Car Co. v. Pennsylvania, 141 U. S. 18.....	35

Pages

Robinson v. Langley, 18 Nev. 71 15
Robins v. Shelby Taxing District, 120 U. S. 489 19

Short v. The State, 29 La. Rep. Ann. 404 14
State v. Porter, 23 N. J. Law 517 14
State Tax on Foreign Held Bonds, 15 Wall. 321 12
State Tax on Foreign Held Bonds, 15 Wall. 300 25
State Treas. v. P. M. B. R. R., 4 Hous. Del. 158 29
Stewart v. Michigan, 232 U. S. 645 20
Stockard v. Morgan, 185 U. S. 27 20
St. Louis v. The Ferry Co., 11 Wall. 423 11

Union Tran. Co. v. Kentucky, 199 U. S. 202 10
Union Tran. Co. v. Kentucky, 199 U. S. 194-206 35

Ward v. Maryland, 12 Wall. 419 22
Welton v. Missouri, 91 U. S. 275 21
Western Oil Refining Co. v. Lipson, 244 U. S. 348 19

TEXT BOOKS.

Desty on Taxation, 256 14

Story on Conflict of Laws, Sec. 43 14

Wharton on Conflict of Laws, Secs. 47-81 14

CONSTITUTION AND STATUTES.

Session Laws of Alaska, 1919, p. 75 et seq 5-26
Sections 1, 6 & 8 5
Section 9 6

Session Laws of Alaska, 1921, page 108 22
Section 1 21
Section 3 21
Section 4 7
Section 11 22
Page 99 30

Organic Act of Alaska, Sec. 9 30

Sub. 1, Ar. IV, Sec. 2, Constitution of the United States .. 22

In the Supreme Court
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No. 627

SVEN HAAVIK,
Appellant,
vs.
ALASKA PACKERS ASSOCIATION,
Appellee.

BRIEF FOR APPELLANT.

I.

Statement of Facts.

This case comes to this court on an appeal from a final decree given and made by the District Court of the United States, Northern District of California, First Division, Southern Division, dismissing libelants' libel, on an order sustaining exceptions to libelants' libel.

The action was for the sum of $10.00, taxes collected by the Territory of Alaska from appellee, and paid by it as taxes levied by the Territory of Alaska upon appellant, and deducted by appellee from appellant's wages at the termination of his service for appellee.

The facts are, that libelant is a citizen of the United States, married, and for many years prior to the date of the filing of his libel he was a resident of the State of California, and never at any time resided in Alaska. (Par. II, p. 2 of Record.)

Appellee was engaged in the salmon canning business for many years prior to, and during the year 1921, sending vessels manned with seamen from the Port of San Francisco each year, carrying all the supplies for salmon canning purposes, excepting the salmon itself to said Alaska, and when salmon was caught and canned it would load the same on vessels and bring it to San Francisco, California, where it would be sold and distributed to all parts of the world, none of said salmon so caught and canned being used in Alaska. (Par. IV, pp. 2 & 3 of Record.)

In April, 1921, appellant was employed by appellee at said San Francisco to proceed to Alaska on its vessel the "Star of Finland" as a seaman and fisherman, and he worked as a seaman in said vessel on its passage to a place called Alitak in Alaska, at which place he assisted in unloading the said "Star of Finland", then did work preparatory to and then caught salmon, which, upon its being canned, he

assisted on loading on board of the said "Star of Finland", and then worked as a seaman on said vessel on her way to said San Francisco where the salmon so caught, canned and conveyed, was sold for consumption in all parts of the world. (Pars. V, VI, VII, VIII & IX, pp. 3 & 4 of Record.)

The "Star of Finland" arrived in Alaska about the middle of May, 1921, and arrived back in San Francisco, October 4, 1921, the duration of appellant's engagement being about 5 months and 17 days. (Par. X, p. 4 of Record.)

Appellant has never attended a school in Alaska, nor were there any schools within several hundred miles of said Alitak, and when not engaged in going to Alaska in the salmon canning business, appellant worked as a seaman on vessels plying on the Pacific Coast of North America. (Par. XI, p. 4 of Record.)

That the Territory of Alaska has a law that levies a poll tax called a school tax of $5.00 per annum, on each person in Alaska, those arriving after the first Monday in April of any year having to pay it within a specified time, and those in Alaska on the first Monday in April of any year having to pay it at another time, and it also has a taxing law, page 99 of the Session Laws of Alaska for the year 1921, which reads as follows:

> "(h) Fishermen who are not residents of the Territory, five dollars ($5.00) per annum. The term "fishermen" shall mean to include all persons employed on a boat engaged in fishing."

Appellee paid each of the taxes to the Territory of Alaska, and appellant does not dispute that it was compelled to pay the taxes as a condition of its doing business, and when being paid the wages earned by appellant in San Francisco, California, at which place such wages were payable, appellee deducted the amount it had paid for said taxes from appellant's wages and the libel was filed to recover the amount so paid for the taxes complained of upon the grounds.

> "That the payment of said taxes by defendant was not binding upon the libelant for the following reasons among others, to-wit:
>
> That it was without the jurisdiction of the Territory of Alaska to levy a poll-tax upon libelant as he was a non-resident of said Territory at the time of its attempted levy upon him.
>
> Both said poll-tax and license tax imposed a burden on interstate and foreign commerce of the United States of America.
>
> The deduction of the amount of each of said taxes from the wages of libelant in San Francisco, California, was without right as the laws of Alaska had no operation therein.
>
> The payment of said poll-tax and license tax and the deduction thereof from the wages of libelant was the taking of property without due process of law.
>
> The said license tax gave to fishermen residents of the Territory of Alaska a privilege, also, an immunity not given to the citizens of other states of the United States of America, and was, and is, in violation of the Organic Act of The Territory of Alaska, in that it gave to fishermen resident of the Territory of Alaska a special privilege and a special immunity and it, also, levied a special assessment upon non-resident fishermen.

That the Territory of Alaska had no power to levy a special license tax upon fishermen engaged in catching fish to be exported out of the Territory of Alaska."

One of the laws of Alaska, *the operation* of which upon appellant is complained of, reads in so far as is applicable to this case, as follows:

Page 75 et seq., Session Laws of Alaska, 1917

"Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States Navy or Revenue Cutter Service, volunteer firemen, paupers, insane persons or territorial charges, *within* the Territory of Alaska, or the waters thereof, over the age of twenty-one years and under the age of fifty years, an annual tax in the sum of five dollars ($5.00) to be paid and collected in the manner provided in the following sections of this Act, and to be deposited by the Treasurer of the Territory of Alaska in a separate fund called the 'School Fund' and used for no other than school purposes."

Then follows a method of collection.

Section 6 makes it a misdemeanor to fail to pay the tax, punishable by fine and imprisonment.

Section 8 requires all employers in Alaska to furnish a list of employees, and if any employee fails to pay the tax, the employer is obligated to deduct the amount thereof from the wages of the employee and pay the same to the Treasurer of Alaska himself, and makes it a misdemeanor on the part of such employer to fail to do so punishable by a fine of not less than $50.00 nor more than

$500.00 if a civil suit is brought against the employer for the tax of the employee, a penalty of $25.00 for each employee is added.

Section 9,

> "The school tax collector, is hereby authorized and empowered to collect said tax herein imposed from any person owing the same when the same shall become delinquent, or from any person, firm or corporation whose duty it is made by this Act to pay any tax from his or its employees, by a seizure and sale of any personal property belonging to such delinquent or to such person, firm or corporation, of sufficient value to pay such tax, penalty and costs of sale, that may be found in the district in which said tax is due and payable."

It will be seen that the employer was bound to pay that tax under penalty of having his property seized.

As to the other tax, appellant was hired to go from San Francisco to Alaska and return and catch salmon during a portion of the time he was in Alaska, the allegation is Paragraph IX, page 4, of record,

> * * * "and when the salmon began to run at said place so that salmon could be caught he went out in boats and caught salmon and when no more salmon could be caught, that which defendant had canned was by libelant and others loaded on board said 'Star of Finland' etc.".

Appellant worked for appellee in boats while fishing, and appellee being the employer of the boat was forced to pay the license tax for its fishermen on

their account or be liable to a fine and imprisonment under Secs. 4 et seq., page 104, of the Session Laws of Alaska, 1921.

The italics throughout this brief are ours.

II.

Assignments of Error.

Appellant relies on each of his specifications of error which read:

I.

The Court erred in sustaining defendant's first exception to Libelant's libel, for the following reasons:

(*a*) Libelant being a resident of and domiciled in the State of California, the Territory of Alaska had no power to tax him for any purpose.

(*b*) Libelant being temporarily in the Territory of Alaska for business purposes, the said Territory had no jurisdiction over him for taxation purposes.

(*c*) Libelant being a resident of and domiciled in the State of California, any taxation of him by the Territory of Alaska, was the taking of property without due process of law.

(*d*) The school, or poll tax, levied upon libelant by the Territory of Alaska imposed an unlawful burden on interstate and foreign commerce.

18 (*e*) The following law of the Territory of Alaska, to wit:

"(*h*) Fishermen who are not residents of the Territory, five dollars (5) per annum. The

term 'fishermen' shall mean to include all persons employed on a boat engaged in fishing." is in conflict with Sub. 1 of Sec. 2, of Article IV of the Constitution of the United States.

(*f*) The said license tax imposed an unlawful burden on interstate and foreign commerce in the case of the libelant.

(*g*) The Territory of Alaska was without power to levy a tax of any character upon libelant a non-resident of the territory and but temporarily engaged in catching salmon to be exported out of that Territory.

(*h*) For the foregoing reasons, the payment by the defendant of the taxes complained of in the libel were not binding on the libelant.

(*i*) The deduction of the amount of the taxes paid by the defendant to the Territory of Alaska, from the wages of the Libelant paid in San Francisco, California, was the taking of property without due process of law, as the laws of Alaska had no operation in said San Francisco.

(*j*) The fishing license tax levied upon nonresidents of the Territory of Alaska was a tax levied upon Libelant's property right to fish in Alaska in violation of Sec. 9 of the Organic Act of Alaska as it discriminated in favor of resident fishermen.

(*k*) The fishing license tax levied upon nonresident fishermen by the Territory of Alaska is a special law in violation of the Act of Congress prohibiting territories from passing local or special laws, approved July 30th, 1886.

(*l*) The fishing license tax levied upon nonresident fishermen by the Territory of
19 Alaska, gives an exclusive privilege and immunity to fishermen residents of Alaska, in violation of the Act of Congress, approved July 30th, 1886, prohibiting Territories of the United States from passing local or special laws.

II.

The Court erred in sustaining defendant's second exception to libelant's libel, for the reason that the decision of the United States Circuit Court of Appeals, in and for the Ninth Circuit, in the case of Hedenskoy v. Alaska Association, reported in 267 Federal Reporter at Page 154, is in conflict with the overwhelming weight of authority on the subjects decided therein."

III.

Brief of the Argument.

This case was decided on exceptions to the libel, which admitted the truth of the allegations of the libel, but denied their legal effect.

The questions involved in this case are as follows:

1. Can an integral part of the United States impose a tax upon a resident of another part, who is temporarily in the taxing part for the purposes of trade and commerce?

2. Can any integral part of the United States levy a tax on interstate and foreign commerce?

3. Can an integral part of the United States impose a special burden on a citizen and resident of another part, not imposed on its own people?

4. Could appellee lawfully deduct the amount it paid the Territory of Alaska for appellant's taxes from money payable only outside the Territory of Alaska?

5. Can one part of the United States tax the citizens of another part for the privilege of entering the territory of the taxing part?

Argument.

NO PART OF THE UNITED STATES CAN TAX A RESIDENT OF ANOTHER PART WHO IS BUT TEMPORARILY IN THE TAXING PART FOR THE PURPOSES OF TRADE AND BUSINESS.

The decisions of this and other courts are uniform that such taxing is the taking of property without due process of law.

Union Transit Co. v. Kentucky, 199 U. S. 202:

> "The power of taxation, indispensable to the existence of every government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, *and schools for the education of his children. If the taxing power be in no position to render these services,* or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, *and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law.*" (Several authorities cited.)

There were no schools within several hundred miles of Alitak, Alaska, and appellant would have to look to the schools of California for the education of his children.

St. Louis v. The Ferry Company, 11 Wallace 423:

Page 430. "Where there is jurisdiction neither as to persons nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be *as much of a nullity as if in conflict with the most explicit constitutional inhibition.* Jurisdiction is as necessary to valid legislation as to valid jurisdiction.

"Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of that state, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. *They did not so abide within the city* as to become incorporated with and form a part of its personal property."

Hays v. Pacific Mail Steamship Co., 17 Howard 596:

Page 598. "She was within the jurisdiction of all or any of them temporarily and *for a purpose wholly excluding the idea of permanently abiding in the state,* or changing her home port. We are satisfied that the state of California had no jurisdiction over these vessels, for the purpose of taxation. *They were not property abiding within its limits so as to become incorporated with the other personal property of the state, they were there but temporarily,* engaged in lawful trade and commerce with their situs at the home port, where the vessels belonged; and where the owners were liable to be taxed for the capital invested and where the taxes had been paid."

Dewey v. Des Moines, 173 U. S. 194:

Page 204. "The power to tax is, however, limited to persons, property and business within the state, *and it cannot reach the persons of a non-resident—"* State Tax v. Foreign-Held Bonds, 15 Wallace 300-319. In Cooley on Taxation, 1st Ed. p. 121, it is said that "a state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state than it can subject all the citizens or all the property of such other state to its powers.

"These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a non-resident to pay such an assessment as this, oversteps the sovereign power of a state."

State Tax on Foreign-Held Bonds, 15 Wallace 321:

"It is undoubtedly true that the legislature of Pennsylvania cannot impose a personal tax

upon the citizens of another state, but the common practice is to take property within the jurisdiction which belongs to non-residents. There must be jurisdiction over either the property or person of the owner, else the power cannot be exercised."

In the Passengers Cases, 7 Howard 48, U. S. 282, the Supreme Court says, on page 407:

"If this power to tax passengers from a foreign country belongs to a state, a tax, on the same principle, may be imposed on all persons *coming into* or passing through it from any other state of the Union. And the New York statute does in fact lay a tax on passengers on board of any coasting vessel which arrives at the port of New York, with an exception of passengers in vessels from New Jersey, Connecticut and Rhode Island, who are required to pay for one trip each month. All other passengers pay the tax every trip. If this may be done in New York, every other state may do the same, on all lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rivers, or on the Lakes, may be required to pay a tax imposed at the discretion of each state within which the boat shall touch. And the same principle will sustain a right in every state to tax all persons who shall pass through its territory on railroad cars, canal-boats, stages, or in any other manner. This would enable a state to establish and enforce non-intercourse with every other state.

"The officers and crew of the vessel are as much the instruments of commerce as the ship, and yet they are taxed under this health law of New York as such instrument."

We can find no difference between the principles of that case and this.

In the case of On Yuen Hai Co. v. Ross, 8 Sawyer 384, an attempt was made to collect a capitation tax from a gang of Chinese working at railroad construction in Oregon, and it was held that they were not liable, the court holding in effect that they were non-residents, and a non-resident could not be taxed.

The law in that case expressly laid the tax on residents, but the court seems to have held it made no difference. Most capitation taxes are expressly laid on residents; that, however, simply shows that the legislatures who have so laid them, understand that they cannot lawfully lay them on any other person. The law seems to be uniform on that point.

Desty on Taxation, Headnote to Sec. 4, page 296:

"Capitation taxes may be imposed on inhabitants of the state even though they be aliens, but they cannot be imposed on non-residents."

Short v. the State, 29 Lawyers' Reports, Ann. 404:

"The place of the imposition of Poll Taxes is universally held to depend upon *the domicile of the person* upon whom they are imposed."

Wharton on Conflict of Laws, Secs. 47-81;

Story on Conflict of Laws, Sec. 43;

City of Oakland v. Whipple, 39 Cal. 112:

"If it had appeared that she was only *in transitu, or there for temporary commercial purposes,* the case would come fully within the principles announced in *People v. Niles* (35

Cal. 282), in which we held that personal property thus *transiently within the county* could not there be taxed; but should be taxed in the county in which the owner resided."

People v. Niles, 35 Cal. 282:

"It must appear that the property is being to some extent kept or maintained in such county, and not there casually or in transitu, or temporarily in the ordinary course of business or commerce."

People v. Townsend, 56 Cal. 633, page 636:

"But to render taxation uniform, it is essential that each taxing district should confine itself to the objects of taxation within its limits. Otherwise, there may be duplicate taxation, and consequent inequality."

Then quoting from Wells v. City of Weston, 28 Mo. 385:

"The Supreme Court of Missouri deny the right of the legislature to subject property located in one taxing district to taxation in another, upon the express ground that it is in substance the arbitrary taxation of the property of one class of citizens for the benefit of another class. * * * As the very purpose of instituting government is the protection of the citizen in his person and property, power to violate these rights would seem to be quite beyond the lawful authority of any government; and certainly the legislative department of this government cannot arbitrarily take the property of one citizen and give it to another, and of course cannot authorize others to do so."

In Robinson v. Langley, 18 Nevada 71, a circus had been taxed, and the court said on page 73:

> "In the sense of the statute, for the purposes of taxation, it was not *within* the state at the time of the assessment, it was here temporarily in the ordinary course of business. * * * As well might this property have been taxed if for the purpose of rest or health plaintiff has stopped a few days in Washoe County, as well might a resident of another state be taxed on his money and teams if he comes on a visit to remain a week." (Cases cited.)

In

Ex parte White, 228 Fed. 88,

the court said of a former poll tax law of New Hampshire identical in meaning with the one in this case or reading.

> "All male polls from twenty-one to seventy years of age are liable to be taxed, except paupers, insane persons, and others by special provisions of law."

The court says:

> "Still, notwithstanding the sweeping terms of the older New Hampshire statutes, if they were the statutes upon which the present rights should depend, it would hardly be urged that they were intended to cover itinerant male persons who happened to be in a given New Hampshire locality on the day on which taxes are required to be assessed, and this without regard to whether they were in the military service or not. The reasonable view would be that the idea of *the right to tax a person presupposes some substantial element of permanency*, and New Hampshire judicial expression, and the judicial reasoning and expression elsewhere, are that way.

> The New Hampshire statutory right to tax must, of course, be determined with reference to the constitutional provisions which gives the Legislature power to tax, and thus the statute of 1830 which did not use the constitutional designation of all the inhabitants of and residents within the state, but the designation of each male poll, was construed by the justices, though dealing with a question in respect to aliens, as having reference to the constitutional term inhabitants and residents, as used in their ordinary sense, and not as including all residents."

See also:

Preston v. City of Boston, 12 Pickering 7;
Opinions of the Judges, 1 Metcalfe 580;
Merrimam v. Stower, 43 Maine 497;
Morgan v. Packham, 16 Wallace 471-8-9;
Brown v. Maryland, 12 Wheaton 419-447;
Metropolitan Life Ins. Co. v. Newark, 62 New Jersey Law 74;
State v. Potter, 23 New Jersey Law 517;
Board of Assessors v. New Orleans, 216 U. S. 517.

The foregoing show that the decisions are uniform to the effect that no part of the United States can tax—non-resident.

2.

NO PART OF THE UNITED STATES CAN LEVY A TAX ON INTERSTATE AND FOREIGN COMMERCE.

It makes no difference what a tax is called, the question is what pays it? In this case appellant

was engaged in interstate and foreign commerce, his earnings therein paid the tax whether he paid it directly or his employer paid, so it is necessarily a tax on such commerce the law is uniform that such a tax cannot be levied.

Kelley v. Rhodes, 188 U. S. 1, which authority must be taken as the final declaration of the law on Sheep Grazing, we find on page 5 the following:

> "The substances of these cases is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation, but if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment."

Coe v. Erroll says:

> "Until actually launched on its way to another state or committed to a common carrier for transportation to such state, its destination is not fixed and certain; it may be sold or otherwise disposed of within the state, and never put in course of transportation."

In the case of Louisiana R. R. Commission v. Texas P. R. R., 229 U. S. 330-341, staves had been cut in Louisiana for shipment to a foreign port and had reached New Orleans. The Supreme Court, on pages 341-342, says:

> "The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for trans-shipment at New Orleans."

In the case of Western Oil Refining Co. v. Lipson, 244 U. S. 348, a tax was laid upon the privilege of shipping and selling oil. It was called a privilege tax, and it was held that it could not be enforced against those who handled interstate oil.

Robins v. Shelby Taxing District, 120 U. S. 489:

494. "In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. In view of these fundamental principles, which are to govern our decision we may approach the question submitted to us in the present case; and inquire whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced there. Do not such restrictions affect the very foundation of interstate trade?" * * *

495. "But how is the merchant or manufacturer to secure such orders? If he may be taxed by such states for doing so, who shall limit the tax? *It may amount to prohibition.* To say that such a tax is not a burden upon interstate commerce, is to speak unadvisedly and without due attention to the truth of things."

Page 497. "*Interstate commerce cannot be taxed at all,* even though the amount of the tax should be laid on domestic commerce or that which is carried on solely within the state. This

was decided in the case of the *The State Freight Tax,* 15 Wallace 282."

Stockard v. Morgan, 185 U. S. 27;
Caldwell v. North Carolina, 187 Id. 622;
Dozier v. Alabama, 218 Id. 124;
Stewart v. Michigan, 232 Id. 645.

In the similar case of Crenshaw v. Arkansas, 227 U. S. 390, the court says, on page 400:

> "We must look, however, to the substance of things, not to the names by which they are labelled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this court."

It is elementary that tax laws must be strongly construed against the tax, that "a tax on the seller of goods is a tax upon the goods themselves." Kehrer v. Stewart, 197 U. S. 60, 65.

This court has also said:

> "Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business. * * * It is a parallel with the case of Brown v. Maryland, 12 Wheat, 419. That was a tax on an occupation, and this Court held that it was equivalent to a tax on the business carried on,—(The importation of goods from foreign countries),—and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibited the states from laying any import. * * * 'And the Court decided that this state law (the Maryland land law under consideration in Brown v. Mary-

land) was a tax on imports, and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance'."

Leloup v. Port of Mobile, 127 U. S. 640, 645, 646, 647.

See also:

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347;

Brown v. Maryland, 12 Wheat 419, 6 L. ed. 678.

3.

CAN AN INTEGRAL PART OF THE UNITED STATES IMPOSE A SPECIAL BURDEN ON A CITIZEN AND RESIDENT OF ANOTHER PART, NOT IMPOSED ON ITS OWN PEOPLE?

The Alaska law reads as follows:

Session Laws of Alaska 1921, pages 97 and 99.

97. "Section 1. Any person, firm or corporation prosecuting or attempting to prosecute, any of the following lines of business, or who shall employ and of the following appliances, in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business and appliances, as follows:

99. "Fishermen who are not residents of the Territory, five dollars ($5) per annum. The term "fishermen, shall mean to include all persons employed on a boat engaged in fishing."

Section 3, page 105 of the act makes it a misdemeanor to fail to pay the license tax, and Section

11, page 108, requires United States Marshals to enforce the provisions of the act, and says they shall be liable to the Territory for all loss it sustains by reason of their failing to do so. Syb. 1 of Section 2 of Article IV of the Constitution of the United States, reads:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

A concern such as appellee was therefore forced to pay the tax under penalty of having its men arrested and its whole venture jeopardized.

In

Ward v. Maryland, 12 Wallace 418,

the law was:

> "37. No person, *not being a permanent resident in this State,* shall sell, offer for sale, or expose for sale, within the limits of the City of Baltimore, any goods, wares, or merchandise whatsoever, other than agricultural products and articles manufactured in the State of Maryland, within the limits of the said City, either by card, sample, or other specimen, or by written or printed trade-lists or catalogue, whether such person be the maker or manufacturer thereof or not *without first obtaining a license.*
>
> 38. Such license shall be issued to the person or copartnership applying for the same on the payment of $300, and shall run one year from date."

There is no distinction between that language and that of the law involved in this case and this court said on page 429:

"but it is not necessary to decide any of those questions in the case before the court, as the court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.
* * * *

Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court. Few cases have arisen in which this court has found it necessary to apply the guaranty ordained in the clause of the Constitution under consideration.

Attempt will not be made to define the words 'privileges and immunities' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that *the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for* the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; *and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens*".

There is no question of the preservation of the fish of Alaska involved, anyone can catch salmon, but if they catch with a line from the shore of a river, or in a seine, or trap, they do not have to

pay a license, if they work for another person, to wit: are

"*employed* on a boat engaged in fishing",

and are non-residents they must pay $5.00 per year.

Geer v. Connecticut, 161 U. S. 519,

does not control this case. It appears that in that case the law was aimed at game to be consumed in the state, was intrastate commerce not interstate. This court says on page 531:

> "So, again, in the Daniel Ball, 10 Wall. 557, 564, this court, speaking through Mr. Justice Field, said:
>
> 'There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States", with foreign nations and with the Indian tribes. This limitation necessarily excludes from the Federal control, commerce not thus designated, and of course, that commerce which is carried on entirely within the limits of a State, and does not exceed to or affect other States.'
>
> The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, *was necessarily only internal commerce,* since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it. All ownership in game killed within the State came under this condition, which the State had the lawful authority to impose, and no contracts made in relation to such prop-

and that of the law involved in this case and this court said on page 429:

> erty were exempt from the law of the State consenting that such contracts be made, *provided only they were confined to internal and did not extend to external commerce.*"

If Alaska desired to preserve the fish within its territorial limits for the use of its own citizens, that would be one thing. This case presents another question, it permits anyone to take salmon for any purpose, but discriminates between residents and non-residents in a matter in which interstate and foreign commerce alone is involved.

4.

THE DEDUCTION OF THIS TAX FROM APPELLANT'S WAGES IN SAN FRANCISCO, WAS UNLAWFUL.

Appellant is a California corporation. It could not at any time be present in Alaska. It might have an agent there, but as to itself it could be present nowhere but in California.

The contract of hiring in this case was made in California. It was an entire contract and was only fully performed when those who signed it returned to this state. None of the earnings were payable except in San Francisco, with the exception of $10.00 and that only after they had left Alaska.

This court has decided squarely that a state cannot tax or affect a contract payable in another territory.

> State Tax on Foreign-Held Bonds, 15 Wallace 300:

Syllabus: "The tax laws of a state have no extra-territorial operation, nor can any law of a state inconsistent with the terms of a contract, made or payable to parties out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the state."

Appellant was entirely without authority to pay the amount in question in this case. As to Alaska itself, it was without power to make or require appellant to pay money in Alaska on account of another person when it owed him nothing, and might never owe him anything. A breach of the contract by any of its employees would have forfeited all right to pay in San Francisco. No one can be made to pay money on account of another, either in advance of the time he owes the money, or when he may be in such a position as to leave it in doubt that he may ever owe him anything, and a demand for the payment of an Alaska tax made in San Francisco has no effect whatever.

5.

THE SCHOOL OR POLL TAX IN THIS INSTANCE OPERATED IN THE CASE OF LIBELANT AS A TAX FOR THE PRIVILEGE OF ENTERING ALASKA.

One part of the law reads, in so far as applicable to the appellant, page 74 of the Session Laws of Alaska, 1919:

* * * "and all persons arriving in the Territory of Alaska after the first Monday in the

month of April shall pay said tax within thirty (30) days after such arrival."* * *

The law meaning April in each year.

The case of Crandall v. the State of Nevada, 73 U. S. 35, decides squarely against the right of a locality to enforce such a law against a non-resident. In that case the State of Nevada levied a capitation tax upon every person leaving the state, by any railroad, stage coach, or other vehicle, etc.

The tax was levied upon the carrier, this court said that made no difference as he would add it to the fare, and the burden would fall upon the passenger, the only difference between that case and this, is that here the men left the Territory at the same locality they entered it. We think that would make the presumption stronger against this tax, nor can we think that fact would affect the principles involved, as in the Crandall case, if a passenger went from California to Nevada and entered that state at the state line and went from there to Reno or elsewhere and desired to return to California, he would have to return by the ordinary lines of travel and leave the state at exactly the same place that he entered. However, the tax would have to be paid.

The court, speaking through Mr. Justice Miller, says on page 38:

"The question for the first time presented to the Court by this record is one of importance. The proposition to be considered is the right of a state to levy a tax upon persons residing in the state who may wish to get out of it, and upon

persons not residing in it who may have occasion to pass through it."

As to the latter class mentioned it is purely a case of whether permanency of residence was intended.

This court further says on page 44:

> "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claims he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. *He has a right to free access to its seaports, through which all the operations of foreign trade and commerce and conducted,* to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is independent of the will of any state over whose soil he may pass in the exercise of it."

We submit that the men in this case had a right to free access to the seaports of Alaska in the operation of interstate or foreign trade and commerce. This court then quoting from dissenting opinion of Chief Justice Taney in the passenger cases, his dissent being upon the ground that a state had the right to levy a tax upon a person coming from a foreign country, but not one entering from another state or territory. Page 49 of the Crandall case, says:

> "We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our

> own states. *And a tax imposed by a state, for entering its territories or harbors,* is inconsistent with the rights which belong to citizens of other states as members of the Union, and with the objects which that Union was intended to attain. Such a power in the states could produce nothing but discord and mutual irritation, and they clearly do not possess it."

If the Territory of Alaska had the power to collect $5.00 in this instance they would have the right to collect a tax of $1000.00 and thus effectually destroy all commerce between itself and other localities. They could by such actions effectually prevent any member of the community of the United States or elsewhere from visiting its territory at all, and thus enjoy the privileges, whatever they may be, that presence in Alaska may bring to the exclusion of the whole world, while the rest of the world would not so deny such privileges to those permanently domiciled in Alaska. We submit that no locality has it within its power to thus restrict trade and commerce between the territory controlled by the United States, or between that territory and foreign countries.

The case of State Treasurer v. P. M. B. R. R. Co., 4 Houston (Del.) 158, is similar to the Crandall case. The court says in that case on page 199:

> "and under the authority of the Nevada case we must hold it to be inoperative and void, so far as it affects passengers entering into, departing from, or passing through the state."

We can see no distinction between a passenger "entering into a state" and a seaman doing likewise.

THE LAW TAXING NON-RESIDENT FISHERMEN WAS IN VIOLATION OF A PART OF SECTION 9 OF THE ORGANIC ACT OF ALASKA.

A part of said Section 9 reads:

> "nor shall the lands *or other property* of non-residents be taxed higher than the land *or other property* of residents."

Appellant had a property right in the right to go to Alaska and fish; this right was taxed, when residents were not taxed, in plain violation of the above language.

Chapter 818 of the Acts of Congress for the year 1886 was a general law for all Territories, and prohibited the passage of special laws by a Territory, and is to the effect that no territory shall pass special or local laws * * *

> "for the assessment and collection of taxes for Territorial, county or road purposes."

This law in so far as pertinent, reads as follows:

Page 99, Session Laws of Alaska:

> (d) Salteris. Ten cents per one hundred pounds on mild-cured red king salmon; five (5) cents per one hundred pounds on mild-cured white king salmon; ten (10) cents per one hundred pounds on salted codfish; two and one-half (2½) cents per one hundred pounds on all other salted and mild-cured fish.
>
> (3) Fish traps, fixed or floating, two hundred dollars ($200) per annum, so-called dummy traps included.
>
> (f) Gill nets and stake nets, two dollars ($2) per one hundred fathoms, or fraction thereof.

(g) Seines, ten dollars ($10) for the first one hundred and fifty fathoms, and five dollars ($5) additional for each twenty-five additional fathoms, or fraction thereof.

Residents and non-residents are on equal terms in all of the foregoing undertakings, but the clause objected to follows, reading:

(h) Fishermen who are not residents of the Territory, five dollars ($5) per annum. The term 'fishermen' shall mean to include all persons *employed* on a boat engaged in fishing."

If he is not employed, but works for himself, he does not pay any license tax, whether he is a resident or non-resident.

The law complained of is clearly special taxation.

REVIEW OF THE DECISION OF THE COURT IN THE CASE OF ALASKA PACKERS ASSOCIATION v. JOHN HEDENSKOY, 267 Fed. 154.

One of the questions involved was before the learned Circuit Court of Appeals for the Ninth Circuit, in the above cause, to-wit, that of the right to tax a non-resident, and the decision of that court was that Alaska could levy the poll tax upon a fisherman but temporarily in Alaska in the course of trade and commerce, it saying:

"It is well established that taxation of personal property *which may be temporarily within a state for profit is lawful* although the owner has his domicile within another state."

We respectfully submit that that is not the law, and the principle there declared is in direct conflict with the decisions of this court on the same subject.

One decision cited in the court's opinion does seem to go to that length, that of

Fennell v. Pauly, 83 Northwestern 799.

In that case, decided in the year 1900, sheep had been taken into the state in December, 1895, and staid there until April, 1896, and it was held they were liable to taxation.

Uniformity of legal principles is always sought. States can, and do, vary between each other in decisions, but Federal courts have no justification for such variance.

The above case, however, stands alone in its doctrine. Each other state deciding upon the same subject has invariably based the taxing power upon the assumption of *permanency of situs.*

In Grigsby Construction Company v. Freeman, also cited in this court's opinion, 32 Southern 399, the court says, page 401:

> "In the instant case the property was not in course of transportation but was here for use, *and for a use likely to be of some duration, possibly a full year,*—and for the time being was incorporated in the bulk of the property of the state. It was distinguishable from the rest of the property of the taxing district in no respect except in the intention of the owner to remove it at some future time more or less distant. *Under these circumstances, its situs approached nearer to permanency* than did that

> of the sheep in the Wyoming case, or that of the coal in the Brown v. Houston case."

The application of the facts of that case under that language to this is impossible, as that court says itself that the right to taxation in that case is based upon probable permanency of *situs,* at least for a full taxing year.

In this case appellant went to Alaska in a ship that he contracted to return in; the ship went for a cargo to bring down with the men. The only element there was in the case, was the certainty that permanency of situs did not exist. There was no room for even speculation that it did.

We find exactly the same condition of permanency in the case of Eoff v. Kennefickers Tax Collector, 96 S. W. 986, also cited in the court's opinion. In that case the court says on page 986:

> "This property was situated in Boone County on the first Monday in June, 1903, how long before and how long after does not appear. * * * How long it required to complete the roadbed was not shown at the hearing of this cause."

The court in that case could not take judicial knowledge that the roadbed would be completed in one or ten taxing years, and had a right to assume that the property would receive at least a taxing year's protection. If the property is but temporarily in the taxing district, as these men were, the decisions of this court are uniform, that if taxed at any place but the domicile of the owner

it is the taking of property without due process of law.

In the case of Brown v. Houston, 114 U. S., 622, the sole question involved was interstate commerce. Coal had been shipped to New Orleans to be sold to anyone that saw fit to purchase it for use in Louisiana or elsewhere, as suited the purchaser. This court decided that it had reached its final destination when it reached New Orleans and had become a part of the property of the State of Louisiana, saying on pages 632-33:

> "It (the tax) was imposed after the coal had arrived at its destination and was put up for sale. The coal had come *to its place* of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. *It had become a part of the general mass of property in the State, and as such* it was taxed for the current year (1880) as all other property in the City of New Orleans was taxed."

The very element of permanency was there established by this court, and it was upon that the case was decided. The coal would never leave except to be consumed, and all of it might be consumed in the State. There is a wide distinction, in fact no similarity, between that case and this.

If one court decides that three months is a proper taxable presence, another may decide that three days is, and eventually the Territory of Alaska might decide that no presence at all was necessary. They

are now collecting poll tax from sailors that go into the Territory and never leave their vessels, we are informed.

In the later case of

Pullman's Car Company v. Pennsylvania, 141 U. S. 18,

decided May, 1891, the decision of this court is based entirely upon the following language, page 26:

> "The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company *had at all times* substantially the same number of cars within the State, *and continuously and constantly* uses there a portion of its property; and it is distinctly found, as a matter of fact, that the company *continuously,* throughout the periods for which these taxes were, carried on business in Pennsylvania, *and had about one hundred* cars within the State."

It was upon the fact of the continuous presence of one hundred cars in the State that the tax was supported. That the cars may have been different at times would be immaterial, and again that was a Pennsylvania corporation endeavoring to escape taxation upon the theory that its property in Pennsylvania was used in interstate commerce. What it had permanently in the State was held liable to taxation, the syllabus reading, in part,

> "and having *at all times* a large number of such cars within the State".

If the foregoing language was not clear, we submit this court has made it clear in the subsequent

case of Union Transit Co. v. Kentucky, 199 U. S. 194 (decided November, 1905), at page 206:

> "The arguments in favor of the taxation of intangible property at the domicile of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion *that it is taxable in the State where it is permanently located and employed* and where it *receives its entire protection*, irrespective of the domicile of the owner. We have, ourselves, held in a number of cases that such property *permanently located* in a State other than that of its owner is taxable there. (Several cases cited, among them being 141 U. S. 18.) We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at *all times* a large number of cars within the State, it may be taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run. Pullman's Car Co. v. Pennsylvania, 141 U. S. 18."

Alaska was not in a position to furnish schools for appellant in Alaska, his children were in California, appellant owed Alaska no allegiance, he owed it where he lived; he, under any construction that can possibly be given to any law, would have a right to show in court, all of the things above mentioned by this court before any of his money was taken to pay the tax, and in addition, under the laws of Alaska itself would have the right to show many things, among them being,

that he was over fifty-five years old, that he had already paid the tax, that he was under twenty-one years old, that he was a soldier under leave of absence, that he was a volunteer fireman, or that he was insane, all of those are exemptions under Section 1 of the law in question. Still under this law of Alaska, it can force a payment by seizing the employer's property, without any right of hearing on the part of the employee.

But under the decision of the court of appeals, the employer is given the right to disburse the employee's money, whether the employee owes it or not; that is not due process of law.

Of course, if the Territory of Alaska can tax a nonresident, every other part of the United States can do the same; if all should do it, a person could be taxed in every county and State he passed through if he left his domicile. It was to prevent that the courts have decided the way they have on the subject.

We, for the foregoing reasons, respectfully submit that the learned District Court for the Northern District of California, erred in sustaining the exceptions to appellant's libel, and pray that this court will reverse the decree rendered herein, and direct such further proceedings as the law and facts warrant.

Dated, San Francisco,
February 24, 1923.

Respectfully submitted,

H. W. HUTTON,

Attorney for Appellant.